

502 Litigation in Bankruptcy Court —A Primer for Counseling through Economic Downturns

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James A. Gibb

James A. Gibb is director of contingent assets and liabilities at Owens Corning in Toledo, Ohio. In addition to general bankruptcy issues, his responsibilities include seeking discharge of various liabilities in the company's Chapter 11 proceeding and managing litigation for the recovery of insurance and other contingent assets.

Prior to his current position, Mr. Gibb was director of litigation with national management responsibility for Owens Corning's asbestos litigation. Prior to joining Owens Corning, Mr. Gibb was in private practice in Columbus, Ohio, where he concentrated primarily in civil litigation. Immediately after law school, Mr. Gibb was a law clerk with the Ohio 10th District Court of Appeals in Columbus.

Mr. Gibb received a BA from Ohio Dominican College and is a graduate of the Capital University School of Law.

Richard D. Gorelick

Richard D. Gorelick is vice president and general counsel of Integra LifeSciences Holdings Corporation based in Plainsboro, New Jersey. Integra is a diversified medical technology company that is a leader in the neurosurgical device market and in the development and manufacture of a broad range of products based upon proprietary technology for the regeneration of tissue *in vivo*.

Previously, Mr. Gorelick served as associate general counsel of Aventis Behring LLC, a global leader in biologics (plasma proteins). Prior to going in-house, Mr. Gorelick was an associate in the Business and Finance Section of Morgan, Lewis & Bockius LLP, resident in Philadelphia, where he concentrated his practice, on corporate reorganizations and creditors' rights (primarily representing creditors) and secured transactions (representing both borrowers and lenders). Mr. Gorelick's representations included secured lenders, creditors' committees, purchasers of assets, defendants in preference actions, parties to executory contracts (such as equipment leases), and environmental claimants.

While in private practice, Mr. Gorelick served as chair of the Uniform Commercial Code Subcommittee of the Philadelphia Bar Association and as an educational chair of the Eastern District of Pennsylvania Bankruptcy Conference, where he was responsible for coordinating educational programs.

Mr. Gorelick is a graduate of Princeton University and Boalt Hall School of Law, University of California at Berkeley.

Richard S. Mannella

Richard Mannella currently works in major claims management for ACE USA in Philadelphia. His responsibilities include managing and resolving complex commercial and personal injury litigation ranging from drug products, construction defects, and environmental liabilities to toxic torts, tobacco, and insurance coverage involving the company and corporate stakeholders.

Mr. Mannella is an experienced attorney with more than 10 years of comprehensive legal and managerial experience in diverse environments, including several law firms and a major pharmaceutical company.

In addition to representing ACE in mediations and other alternative dispute resolution forums, Mr. Mannella serves as an arbitrator for the Philadelphia Court of Common Pleas. He has also acted as pro bono counsel representing exceptional children in due process proceedings under the Individuals with Disabilities in Education Act.

Mr. Mannella received a BA from Rutgers College and is a graduate of Rutgers University School of Law.

Natalie D. Ramsey

Natalie D. Ramsey is a partner in both the corporate and litigation departments at Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia. Her practice focuses on bankruptcy, lending, acquisitions, and general corporate law. She is vice chair of the firm's business department, chair of the bankruptcy reorganization section of the corporate department, and serves on the firm's hiring and personnel committees.

Ms. Ramsey has achieved dual board certification in business bankruptcy and consumer bankruptcy from the American Board of Certification, sponsored by the American Bankruptcy Institute.

Ms. Ramsey currently serves as secretary of the Eastern District of Pennsylvania Bankruptcy Conference. She is a director of the Consumer Bankruptcy Advocacy Project, and participates in the Commercial Law League, the Turnaround Management Association, and INSOL. Ms. Ramsey is also the president of the board of Delaware Valley Habitat for Humanity, a consortium of nine affiliates of Habitat for Humanity International. She is actively involved in church and community activities.

Ms. Ramsey received a BS *magna cum laude* and with honors from the University of Delaware, and a JD from the Villanova University School of Law, where she was a member of the Moot Court Board and chair of its Outside Competitions Committee.

US Code as of: 01/23/00

Sec. 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if -

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)

(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

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Sec. 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against

property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section -

(A) of the commencement or continuation of an action or proceeding for -

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a

judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 21, 1998, 112 Stat. 2681-866;)

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of -

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

- (14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;
- (15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;
- (16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;
- (17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or
- (18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition. The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.
- (c) Except as provided in subsections (d), (e), and (f) of this section -
- (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
 - (2) the stay of any other act under subsection (a) of this section continues until the earliest of -
 - (A) the time the case is closed;
 - (B) the time the case is dismissed; or
 - (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.
- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such

stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section -

- (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
- (2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

US Code as of: 01/23/00

Sec. 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)

- (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.
- (2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then

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- (A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and
- (B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date

of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended -

- (i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;
- (ii) pursuant to subsection (g)(2) of such section; or
- (iii) by the court after notice and a hearing.

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless -

- (A) each entity that has an interest in such cash collateral consents; or
- (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased,

or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

- (1) partition in kind of such property among the estate and such co-owners is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the

commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value

of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this

subsection.

(o) In any hearing under this section -

- (1) the trustee has the burden of proof on the issue of adequate protection; and
- (2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

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Sec. 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee

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- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to -

- (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
- (B) the commencement of a case under this title;
- (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
- (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance

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(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or

assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d)

(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such

performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate -

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must

assume or reject an unexpired lease of nonresidential real property shall be without prejudice to -

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations

under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on -

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(A)

(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)

(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if

there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if -

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease -

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title -

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title -

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)

(1)

(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and -

(i) if the rejection by the trustee amounts to such a breach as

would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or (ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection,

of

any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)

(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and -

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such

timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)

(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession -

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or

lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual

property, the licensee under such contract may elect -

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for -

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract -

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive -
(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and
(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall -

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall -

(A) to the extent provided in such contract or any agreement supplementary to such contract -

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

US Code as of: 01/23/00

Sec. 501. Filing of proofs of claims or interests

- (a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.
 - (b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.
 - (c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.
 - (d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.
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US Code as of: 01/23/00

Sec. 502. Allowance of claims or interests

- (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.
- (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that -
 - (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
 - (2) such claim is for unmatured interest;
 - (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
 - (4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
 - (5) such claim is for a debt that is unmatured on the date of

the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds -

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of -

- (i) the date of the filing of the petition; and
- (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds -

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of -

- (i) the date of the filing of the petition; or
- (ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purpose of allowance under this section -

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or

724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)

(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that -

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a),

(i) In an involuntary case, a claim arising in the ordinary

(e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of

the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

US Code as of: 01/23/00

Sec. 1101. Definitions for this chapter

In this chapter -

- (1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;
- (2) "substantial consummation" means -
 - (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
 - (B) assumption by the debtor or by the successor to the

debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
(C) commencement of distribution under the plan.

US Code as of: 01/23/00

Sec. 1102. Creditors' and equity security holders' committees

(a)

(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business and for cause, the court may order that a committee of creditors not be appointed.

(b)

(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

(2) A committee of equity security holders appointed under subsection (a)(2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.

US Code as of: 01/23/00

Sec. 1103. Powers and duties of committees

(a) At a scheduled meeting of a committee appointed under section 1102 of

this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

(c) A committee appointed under section 1102 of this title may -

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

(d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

US Code as of: 01/23/00

Sec. 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation

of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee -

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if -

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

(d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

US Code as of: 01/23/00

Sec. 1106. Duties of trustee and examiner

(a) A trustee shall -

(1) perform the duties of a trustee specified in sections

704(2), 704(5), 704(7), 704(8), and 704(9) of this title;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable -

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this

section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

US Code as of: 01/23/00

Sec. 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

US Code as of: 01/23/00

Sec. 1108. Authorization to operate business

Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

US Code as of: 01/23/00

Sec. 1109. Right to be heard

(a) The Securities and Exchange Commission may raise and may appear and be

heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

US Code as of: 01/23/00

Sec. 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)

(1)

(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless

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(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if -

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

US Code as of: 01/23/00

Sec. 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter

7 of this title unless -

- (1) the debtor is not a debtor in possession;
- (2) the case originally was commenced as an involuntary case under this chapter; or
- (3) the case was converted to a case under this chapter other than on the debtor's request.

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including -

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors;
- (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
- (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
- (7) inability to effectuate substantial consummation of a confirmed plan;
- (8) material default by the debtor with respect to a confirmed plan;
- (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
- (10) nonpayment of any fees or charges required under chapter 123 of title 28.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if -

- (1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsections (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

US Code as of: 01/23/00

Sec. 1121. Who may file a plan

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if -

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a

hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

(e) In a case in which the debtor is a small business and elects to be considered a small business -

(1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;

(2) all plans shall be filed within 160 days after the date of the order for relief; and

(3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may -

(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and

(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.

US Code as of: 01/23/00

Sec. 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

US Code as of: 01/23/00

Sec. 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall

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(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

- (3) specify the treatment of any class of claims or interests that is impaired under the plan;
- (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
- (5) provide adequate means for the plan's implementation, such as -

- (A) retention by the debtor of all or any part of the property of the estate;
- (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
- (C) merger or consolidation of the debtor with one or more persons;
- (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;
- (E) satisfaction or modification of any lien;
- (F) cancellation or modification of any indenture or similar instrument;
- (G) curing or waiving of any default;
- (H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;
- (I) amendment of the debtor's charter; or
- (J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

- (6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the

event of default in the payment of such dividends; and
(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

- (b) Subject to subsection (a) of this section, a plan may -
- (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
 - (2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
 - (3) provide for -
 - (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
 - (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
 - (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
 - (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
 - (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.
- (c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.
- (d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.
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US Code as of: 01/23/00

Sec. 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan -

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default -

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

US Code as of: 01/23/00

Sec. 1125. Postpetition disclosure and solicitation

(a) In this section -

- (1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and
- (2) "investor typical of holders of claims or interests of the

relevant class" means investor having -

- (A) a claim or interest of the relevant class;
- (B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and
- (C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

(f) Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business -

- (1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

- (2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and
- (3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.
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US Code as of: 01/23/00

Sec. 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if -

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have

accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

US Code as of: 01/23/00

Sec. 1127. Modification of plan

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title.

After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan

as

modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

US Code as of: 01/23/00

Sec. 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)

(A)

(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests

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(A) each holder of a claim or interest of such class -

(i) has accepted the plan; or

- (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
 - (B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.
- (8) With respect to each class of claims or interests -
- (A) such class has accepted the plan; or
 - (B) such class is not impaired under the plan.
- (9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that -
- (A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
 - (B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive -
 - (i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
 - (ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and
 - (C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.
- (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted

the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)

(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides -

(i)

(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the

effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims -

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests -

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of

proof on the issue of avoidance.

US Code as of: 01/23/00

Sec. 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan -

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not -

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title;

or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if -

(A) the plan provides for the liquidation of all or

- substantially all of the property of the estate;
- (B) the debtor does not engage in business after consummation of the plan; and
- (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.
- (4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.
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<http://www.ncbj.org/ncbjhomepage/faq1bkctylaw/chapter.htm>

Reorganization Under The Bankruptcy Code - Chapter 11

Public Information Series of the Bankruptcy Judges Division
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While the information presented herein is accurate as of the date of publication, it should not be cited or relied upon as legal authority. This information should not be used as a substitute for reference to the United States Bankruptcy Code (title 11, United States Code) and the Bankruptcy Rules, both of which may be reviewed at local law libraries, or to any local rules of practice adopted and disseminated by each bankruptcy court. Finally, this fact sheet should not substitute for the advice of competent legal counsel. For additional copies of this publication, please contact the Bankruptcy Judges Division, Administrative Office of the United States Courts (202) 273-1900.

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a "reorganization" bankruptcy.

Background

An individual may file under chapter 11; however, the provisions of chapter 11 are generally used to reorganize a business. Chapter 11 allows the debtor to continue its business operations by means of a plan of reorganization, which must meet certain statutory criteria. 11 U.S.C. 1129. By enacting chapter 11, Congress gave the debtor a chance to restructure its finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. Because chapter 11 envisions an ongoing business, the most likely persons to have knowledge of the operation and details of the business are the existing managers who normally continue operations during the chapter 11 process. A major rationale for business reorganizations is that the value of a business as an ongoing concern is greater than it would be if its assets were sold. When a business develops financial difficulties, such as not being able to pay its creditors due to cash flow problems, it may consider filing a chapter 11 bankruptcy. If the business can extend or reduce its debts or drastically lower its operating costs, it often can be returned to a viable state. Generally, it is more economically efficient to reorganize than to liquidate, because doing so preserves jobs and assets.

Cooperation among the various interests is crucial to a successful reorganization.

How Chapter 11 Works

The bankruptcy petition is the document which commences a bankruptcy case. Fed. R. Bankr. P. 1002. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. 11 U.S.C. 301, 303. A voluntary petition should adhere to the format of Form 1 of the Official Forms prescribed by the Judicial Conference of the United States. The Official Forms may be purchased at legal stationery stores. The voluntary petition will include standard information concerning the debtor's name(s), social security number or tax identification number, residence, location of principal assets (if a business), the debtor's plan or intention to file a plan, and a request for relief under the appropriate chapter of the Bankruptcy Code. In addition, the voluntary petition will indicate whether the debtor qualifies as a small business as defined in 11 U.S.C. 101(51C) and whether the debtor elects to be considered a small business under 11 U.S.C. 1121(e). Upon the filing of a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for such relief, the debtor automatically assumes an additional identity as the "debtor in possession." 11 U.S.C. 1101. The term refers to a debtor that keeps possession and control of its assets while undergoing a reorganization under chapter 11, without the appointment of a case trustee and prior to confirmation of a chapter 11 plan. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession," continues to operate the business and performs many of the functions that a trustee performs in cases under other chapters. 11 U.S.C. 1107(a). For a further discussion of trustees, refer to pages 4 and 5 below.

A written disclosure statement and a plan of reorganization must be filed with the court. 11 U.S.C. 1121. The disclosure statement is a document that must contain information concerning the assets, liabilities, and affairs of the debtor sufficient to enable a creditor to make an informed judgment about the plan. 11 U.S.C. 1125. The information required is governed by judicial discretion and the circumstances of the case. The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. The plan must be voted upon by those creditors whose claims are "impaired," i.e., those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan. 11 U.S.C. 1126. After the disclosure statement is approved and the ballots are collected and tallied, there must be a confirmation hearing at which the court determines whether to confirm the plan. 11 U.S.C. 1128.

The Chapter 11 Debtor In Possession

While individuals are not precluded from using chapter 11, it is more typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation does not put the personal assets of the stockholders at risk, although they may lose the value of their investment in the company's stock. A sole proprietorship, on the other hand, does not have an identity separate and distinct from its owner(s); accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal estates of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners; however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners may, themselves, be forced to file for bankruptcy protection.

Section 1107 of the Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and requires the performance of all but the investigative functions and duties of a trustee. These duties are set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. 11 U.S.C. 1106, 1107; Fed. R. Bankr. P. 2015(a). Such powers and duties include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the United States trustee, such as monthly operating reports. The debtor in possession also has many of the other powers and duties of a trustee including the right, with the court's approval, to employ attorneys, accountants, appraisers, auctioneers, or other professional persons. Other responsibilities include filing tax returns and filing such reports as are necessary or as the court orders after confirmation, such as a final accounting. The United States trustee is responsible for monitoring the compliance of the debtor in possession with the reporting requirements.

It should be noted that railroad reorganizations have specific requirements under subsection IV of chapter 11 which will not be addressed here and that stock and commodity brokers are prohibited from filing under chapter 11 and are restricted to chapter 7. 11 U.S.C. 109(d).

The Small Business Debtor

Certain types of debtors are defined in the Bankruptcy Code and have special provisions that apply only to them. One such debtor is a "small business," defined as a person engaged in commercial or business activities (not including a person that primarily owns or operates real property) that has aggregate noncontingent liquidated secured and unsecured debts that do not exceed \$2,000,000. 11 U.S.C. 101(51C). If a debtor qualifies and elects to be considered a small business under 11 U.S.C. 1121(e), the case is put on a "fast track" and treated differently than a regular chapter 11 case under the Code. For example, the appointment of a creditors' committee and a separate hearing to approve the disclosure statement are not mandatory. On request of a party in interest and for cause, the court may order that a creditors' committee not be appointed. 11 U.S.C. 1102(a)(3). The court may conditionally approve a disclosure statement, subject to final approval after notice and a hearing. Solicitation of votes for acceptance or rejection of the plan may proceed based on the conditional approval of the disclosure statement. Thereafter, the disclosure statement hearing may be combined with the confirmation hearing. 11 U.S.C. 1125(f). In addition, the debtor has a shortened period of time (100 days from the date of the order for relief) within which only the debtor may file a plan. After the 100-day period expires, any party in interest may file a plan; however, all plans must be filed within 160 days from the date of the order for relief. 11 U.S.C. 1121(e). (The filing of a voluntary bankruptcy petition constitutes an "order for relief." 11 U.S.C. 301.)

The Single Asset Real Estate Debtor

Another type of debtor that has special provisions under the Bankruptcy Code is a single asset real estate debtor. The term "single asset real estate" is defined as "a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor" other than operating the real property and which has aggregate noncontingent liquidated secured debts of no more than \$4,000,000. 11 U.S.C. 101(51B). The Code provides circumstances under which creditors of a single asset real estate debtor may obtain relief from the automatic stay. 11 U.S.C. 362(d). For example, on request of a creditor with a claim secured by the real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor, within 90 days from the date of the order for relief, unless the debtor files a feasible plan of reorganization or begins making payments to the creditor. The payments must be equal to the current fair market interest rate on the value of the creditor's interest in the real estate. 11 U.S.C. 362(d)(3).

The Automatic Stay

The automatic stay provides for a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued on any debt or claim that arose before the filing of the bankruptcy petition. As with cases under other chapters of the Bankruptcy Code, a stay of creditor actions against the debtor automatically goes into effect when the bankruptcy petition is filed. 11 U.S.C. 362(a). The filing of a petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. 362(b). The stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor's financial situation.

Under certain circumstances, such as when the debtor has no equity in the particular property and that property is not necessary for an effective reorganization, the secured creditor can obtain an order from the court granting relief from the automatic stay to foreclose on the property, sell it, and apply the proceeds to the debt. 11 U.S.C. 362(d). A secured creditor is one which has a lien against or interest in certain property of the debtor to secure payment of a debt or performance of an obligation. See 11 U.S.C. 101(37).

It should be noted that, although creditors are stayed from action against the debtor unless relief is granted by the court, section 331 of the Code permits applications for fees to be made by certain professionals during the case. Thus, a trustee, a debtor's attorney, or any professional person may apply to the court at intervals of 120 days for interim compensation and reimbursement payments. In very large cases with extensive legal work the court may permit more frequent applications. Although professional fees may be paid pursuant to authorization by the court, the debtor cannot make payments to creditors on prepetition obligations, *i.e.*, obligations which arose before the filing of the bankruptcy petition. The ordinary expenses of the ongoing business, however, continue to be paid.

Creditors' Committees

Creditors' committees can play a major role in chapter 11 cases. The United States trustee, a federal employee to be distinguished from a private case trustee or panel trustee, appoints the committee, which ordinarily consists of the persons willing to serve on the committee who hold the seven largest unsecured claims against the debtor. 11 U.S.C. 1102. Unsecured claims are those for which the extension of credit was based upon an evaluation by the creditor of the debtor's ability to pay, as opposed to retaining a lien against the property of the debtor to secure payment. In addition, other types of unsecured claims may arise from patent infringement, personal injury, or other damage claims. The committee may consult with the debtor in possession on the administration of the case, investigate the conduct of the debtor and the operation of the business, and participate in the formulation of a plan. 11 U.S.C. 1103. A creditors' committee can be an important safeguard to the proper management of the business by the debtor in possession.

Who Can File A Plan

There is no specific statutory time limit set for the filing of a plan; however, the debtor (unless a "small business" debtor, as set out above) has a 120-day period during which it has an exclusive right to file a plan. 11 U.S.C. 1121(b). The debtor's exclusive period in which to file a plan may be extended or reduced by the court. After the exclusive period has expired, a creditor or the case trustee may file a competing plan. The United States trustee, however, may not file a plan. 11 U.S.C. 307.

A chapter 11 case may continue for many years unless the court, the United States trustee, the committee, or another party in interest acts to ensure its timely resolution. The creditors' right to file a competing plan, however, provides incentive for the debtor to file a plan within the exclusive period and acts as a check on excessive delay in the bankruptcy.

Avoidable Transfers

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. Such powers may be used to undo a transfer of money or property made during a certain period of time prior to the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgorgement" of the payments or property, which then are available to pay all creditors, rather than only one. Generally, the power to avoid transfers is effective against transfers made within 90 days prior to the filing of the petition. However, transfers to insiders (*i.e.*, relatives, general partners, and directors or officers of the debtor) made up to a year prior to filing can be avoided or undone. 11 U.S.C. 101(31), 101(54), 547, 548. In addition, under 11 U.S.C. 544, the trustee is given the authority to avoid transfers under applicable state law, which often provides for longer time periods.

Cash Collateral, Adequate Protection, And Operating Capital

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter 11 case, other issues may arise which must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease

property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise. 11 U.S.C. 363(c). If the sale or use is outside the ordinary course of business, permission from the court is required. A debtor in possession may not use "cash collateral," i.e., collections of accounts subject to security interests or proceeds from the sale of pledged inventory or equipment, without the consent of the secured party or authorization by the court which must first examine whether the interest of the secured party is adequately protected. 11 U.S.C. 363.

When "cash collateral" is used, either in the ordinary course of business or outside of it, the secured creditors receive additional protection under section 363 of the Bankruptcy Code. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization, after notice and hearing, the debtor in possession must segregate and account for cash collateral. 11 U.S.C. 363(c)(4). A party with an interest in property being used by the debtor may request that the court prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor.

Adequate protection may be required to protect the value of the creditor's interest in the property being used by the debtor in possession. This is especially important when there is a decrease in value of the property. The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the creditor's property interest being adequately protected. 11 U.S.C. 361.

When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved "superpriority" over other unsecured creditors or a lien on property of the estate. 11 U.S.C. 364.

Appointment Or Election Of A Case Trustee

Although the appointment of a case trustee is a rarity in a chapter 11 case, a party in interest or the United States trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the United States trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. 1104(a). The trustee is appointed by the United States trustee, after consultation with parties in interest and subject to the court's approval. Fed. R. Bankr. P. 2007.1. Alternatively, a trustee in a case may be elected if a party in interest requests the election of a trustee within 30 days after the court orders the appointment of a trustee. In that instance, the United States trustee convenes a meeting of creditors for the purpose of electing a person to serve as trustee in the case. 11 U.S.C. 1104(b).

In chapter 11 cases, the United States trustee, a federal employee, does not act as a case trustee, who is generally a private individual. The United States trustee is responsible for monitoring all chapter 11 cases and has standing to appear and be heard on any issue in any case, but may not file a plan. See 11 U.S.C. 307. The case trustee, on the other hand, is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Code requires the trustee to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. 11 U.S.C. 1106(a)(5).

The court, after notice and hearing, may, at any time before confirmation, upon the request of a party in interest or the United States trustee, terminate the trustee's appointment and restore the debtor to possession and management of the property of the estate and of the operation of the debtor's business. 11 U.S.C. 1105.

The Role Of An Examiner

The appointment of an examiner in a chapter 11 case happens rarely, as does the appointment of a case trustee. In addition, the role of an examiner is generally more limited than that of a trustee. The examiner is authorized to perform the investigatory functions of the trustee and is required to file a statement of any investigation conducted. If ordered to do so by the court, however, an examiner may carry out any other duties of a trustee that the court orders the debtor in possession not to perform. 11 U.S.C. 1106. The individual court has the authority to determine the duties of an examiner in each particular case. In some cases, the examiner may file a plan of reorganization, negotiate or help the parties negotiate, or review the debtor's schedules to determine whether some of the claims are improperly listed as disputed, contingent, or unliquidated, or whether other claims should be listed as such. Sometimes, the examiner may be directed to determine if objections to any proofs of claim should be filed or whether causes of action have sufficient merit so that further action should be taken. The examiner in a case, however, may not serve as a trustee. 11 U.S.C. 321.

The United States Trustee Or Bankruptcy Administrator

In addition to the private case trustee or examiner and the creditors' committee, the United States trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The United States trustee is responsible for monitoring the debtor in possession's operation of the business, the submission of operating reports and fees, applications for compensation and reimbursement, plans and disclosure statements, and creditors' committees. The United States trustee conducts a meeting of the creditors, often referred to as the "section 341 meeting," in a chapter 11 case. 11 U.S.C. 341. The United States trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case.

The United States trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, the establishment of new bank accounts, and the payment of current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the United States trustee for each quarter of a year until a plan is confirmed or the case is converted or dismissed. 28 U.S.C. 1930(a)(6). The amount of the fee, which may range from \$250 to \$5,000, depends upon the amount of disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the United States trustee or orders of the bankruptcy court or fail to take the appropriate steps to bring the case to confirmation, the United States trustee may file a motion with the court to have the debtor's chapter 11 case converted to a case under another chapter of the Code or to have the case dismissed.

It should be noted that in North Carolina and Alabama, bankruptcy administrators perform similar functions that United States trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the United States trustee program is administered by the Department of Justice. For purposes of this fact sheet, references to United States trustees are also applicable to bankruptcy administrators.

Motions

Prior to confirmation of a plan, there are several activities that may take place in a chapter 11 case. The continued operation of the debtor's business may lead to the filing of a number of strongly-contested motions. The most common are those seeking relief from the automatic stay, the use of cash collateral, or to obtain credit. There may also be litigation over executory (*i.e.*, unfulfilled) contracts and unexpired leases and the assumption or rejection of those executory contracts and unexpired leases by the debtor in possession. 11 U.S.C. 365. Delays in formulating, filing, and obtaining confirmation of a plan often cause creditors to file motions for relief from stay or motions to convert the case to a chapter 7 or to dismiss the case altogether.

Adversary Proceedings

Frequently, the debtor in possession will institute a lawsuit, known as an adversary proceeding, to recover money or property for the estate. Adversary proceedings may take the form of lien avoidance actions, actions to avoid preferences, actions to avoid fraudulent transfers, or actions to avoid post petition transfers. Such proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure. At times, a creditors' committee may be authorized by the bankruptcy court to pursue these actions against insiders if the plan provides for the committee to do so or if the debtor has refused a demand to do so. Creditors may also initiate adversary proceedings by filing complaints to determine the validity or priority of a lien, to revoke an order confirming a plan, to determine the dischargeability of a debt, to obtain an injunction, or to subordinate a claim of another creditor.

Claims

A claim is a right to payment or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. 101(5). In some instances, a creditor must file a proof of claim form along with documentation evidencing the validity and amount of the claim. When proofs of claim are required to be filed, creditors must file the proofs of claim with the bankruptcy clerk in the district where the case is pending. The clerk is required to keep a list of claims filed in a case when it appears that there will be a distribution to unsecured creditors. Fed. R. Bankr. P. 5003(b). Most creditors whose claims are scheduled (*i.e.*, claims listed by the debtor on the debtor's schedules), but not listed as disputed, contingent, or unliquidated, need not file claims because the schedule of liabilities is deemed to constitute evidence of the validity and amount of those claims. 11 U.S.C. 1111. Any creditor whose claim is not scheduled or is scheduled as disputed, contingent, or unliquidated must file a proof of claim in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). If a scheduled creditor chooses to file a claim, a properly filed proof of claim supersedes any scheduling of that claim. Fed. R. Bankr. P. 3003(c)(4). It is the responsibility of the creditor to determine whether the claim is accurately listed. The debtor must provide notification to those creditors whose names are added and whose claims are listed as a result of an amendment to the schedules. The notification also should advise such creditors of their right to file proofs of claim and that their failure to do so may prevent them from voting upon the debtor's plan of reorganization or participating in any distribution under that plan. When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated claims, the debtor must provide notice of the amendment to any entity affected. Fed. R. Bankr. P. 1009(a).

Equity Security Holders

An equity security holder is a holder of an equity security of the debtor. Examples of an equity security are a share in a corporation, an interest of a limited partner in a limited partnership, or a right to purchase, sell, or subscribe to a share, security, or interest of a share in a corporation or an interest in a limited partnership. 11 U.S.C. 101(16) & (17). An equity security holder may vote on the plan of reorganization and may file a proof of interest, rather than a proof of claim. A proof of interest is deemed filed for any interest that appears in the debtor's schedules, unless it is scheduled as disputed, contingent, or unliquidated. 11 U.S.C. 1111. An equity security holder whose interest is not scheduled or scheduled as disputed, contingent, or unliquidated must file a proof of interest in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). A properly filed proof of interest supersedes any scheduling of that interest. Fed. R. Bankr. P. 3003(c)(4). Generally, most of the provisions that apply to proofs of claim, as discussed above, are also applicable to proofs of interest.

Conversion Or Dismissal

A debtor in a case under chapter 11 has a one-time absolute right to convert the chapter 11 case to a case under chapter 7 unless (1) the debtor is not a debtor in possession, (2) the case originally was commenced as an involuntary case under chapter 11, or (3) the case was converted to a case under chapter 11 other than at the debtor's request. 11 U.S.C. 1112(a). A debtor in a chapter 11 case does not have an absolute right to have the case dismissed upon request.

Generally, upon the request of a party in interest in the case or the United States trustee, after notice and hearing and "for cause," the court may convert a chapter 11 case to a case under chapter 7 or dismiss the case, whichever is in the best interest of creditors and the estate. 11 U.S.C. 1112(b). The court may convert or dismiss a case "for cause" when there is a continuing loss to the estate, an inability to effectuate a plan, unreasonable delay that is prejudicial to creditors, denial or revocation of confirmation, or inability to consummate a confirmed plan.

There are important exceptions to the conversion process in a chapter 11 case. One exception is that, unless the debtor requests the conversion, section 1112(c) of the Code prohibits the court from converting a case involving a farmer or charitable institution to a liquidation case under chapter 7.

The Disclosure Statement

The filing of a written disclosure statement is preliminary to the voting on a plan of reorganization, and the disclosure statement must provide "adequate information" concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. 11 U.S.C. 1125. After the disclosure statement is filed, the court must hold a hearing to determine whether the disclosure statement should be approved. Acceptance or rejection of a plan cannot be solicited without prior court approval of the written disclosure statement. 11 U.S.C. 1125(b). After the disclosure statement has been approved, the debtor or proponent of a plan can begin to solicit acceptances of the plan, and creditors may also solicit rejections of the plan. Fed. R. Bankr. P. 3017(d) requires that, upon approval of a disclosure statement, unless the court orders otherwise with respect to unimpaired classes, the following must be mailed to the United States trustee and all creditors and equity security holders: (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of the plan may be filed; and (4) such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion. Fed. R. Bankr. P. 3017(d). In addition, the debtor must mail to the creditors and equity security holders entitled to vote on the plan or plans (1) notice of the time fixed for filing objections; (2) notice of the date and time for the hearing on confirmation of the plan; and (3) a ballot for accepting or rejecting the plan and, if appropriate, a designation for the creditors to identify their preference among competing plans. Id.

Acceptance Of The Plan Of Reorganization

As noted earlier, during the first 120-day period after the filing of the voluntary bankruptcy petition, which filing also acts as the order of relief, only the debtor in possession may file a plan of reorganization. The debtor in possession has 180 days after the filing of the voluntary petition (or in a case commenced by an involuntary petition, after the order for relief) to obtain acceptances of the plan. 11 U.S.C. 1121. For cause, the court may extend or reduce this exclusive period. 11 U.S.C. 1121(d). The exclusive right of the debtor in possession to file a plan is lost and any party in interest, including the debtor, may file a plan if and only if (1) a trustee has been appointed in the case, (2) the debtor has not filed a plan within the 120-day exclusive period or any extension granted by the court, or (3) the debtor has not filed a plan which has been accepted by each class of claims or interests that is impaired under the plan within the 180-day period or any extensions granted by the court. 11 U.S.C. 1121.

If the exclusive period expires before the debtor has filed and obtained acceptance of a plan, other parties in interest in a case, such as the creditors' committee or a creditor, may file a plan. Such a plan may compete with a plan filed by another party in interest or by the debtor. If a trustee is appointed, the trustee is responsible for filing a plan, a report of why the trustee will not

file a plan, or a recommendation for the conversion or dismissal of the case. 11 U.S.C. 1106(a)(5). A proponent of a plan is subject to the same requirements as the debtor with respect to disclosure and solicitation.

It should be noted that, in a chapter 11 case, a liquidating plan is permissible. Such a plan often allows the debtor in possession to liquidate the business under more economically advantageous circumstances than a chapter 7 liquidation. It also permits the creditors to take a more active role in fashioning the liquidation of the assets and the distribution of the proceeds than in a chapter 7 case.

Section 1123(a) of the Bankruptcy Code lists the mandatory provisions of a chapter 11 plan and section 1123(b) lists the discretionary provisions. Section 1123(a)(1) provides that a chapter 11 plan shall designate classes of claims and interests for treatment under the reorganization. Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders.

Under section 1126(c) of the Code, an entire class of claims has accepted a plan if the plan has been accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims of the class held by creditors that have accepted or rejected the plan, *i.e.*, creditors who have voted on the plan. Under section 1129(a)(10), if there are impaired classes of claims, the court cannot confirm a plan unless it has been accepted by at least one class of non-insiders who hold impaired claims (*i.e.*, claims that are not going to be paid completely or in which some legal, equitable, or contractual right is altered). Moreover, under section 1126(f), holders of unimpaired claims are deemed to have accepted the plan.

Under section 1127(a) of the Bankruptcy Code, the proponent may modify the plan at any time before confirmation, and the modified plan will become the plan; but the plan as modified must meet all the requirements of chapter 11. Federal Rule of Bankruptcy Procedure 3019 provides that, when there is a proposed modification after balloting has been conducted and the court finds after a hearing that the proposed modification does not adversely affect the treatment of any creditor who has not accepted the modification in writing, the modification shall be deemed to have been accepted by all creditors who previously accepted the plan. If it is determined that the proposed modification does have an adverse effect on the claims of nonconsenting creditors, then another balloting must take place.

Because more than one plan may be submitted to the creditors for approval, Federal Rule of Bankruptcy Procedure 3016(b) requires that every proposed plan and modification be dated and identified with the name of the entity or entities submitting such plan or modification. When competing plans are presented and meet the requirements for confirmation, the court must consider the preferences of the creditors and equity security holders in determining which plan to confirm.

Any party in interest may file an objection to confirmation of a plan. The Bankruptcy Code requires the court, after notice, to hold a hearing on the confirmation of a plan. If no objection to confirmation has been timely filed, the Code allows the court to determine that the plan has been proposed in good faith and according to law. Fed. R. Bankr. P. 3020(b)(2). Before confirmation can be granted, the court must be satisfied that there has been compliance with all the other requirements of confirmation set forth in section 1129 of the Code, even in the absence of any objections. In order to confirm the plan, the court must find that (1) the plan is feasible, (2) it is proposed in good faith, and (3) the plan and the proponent of the plan are in compliance with the Code. In addition, the court must find that confirmation of the plan is not likely to be followed by liquidation or the need for further financial reorganization.

The Discharge

While some courts have a practice of issuing a discharge order in a case involving an individual, a separate order of discharge is usually not entered in a chapter 11 case. Section 1141(d)(1) specifies that the confirmation of a plan discharges the debtor from any debt that arose before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new contractual rights, replacing or superseding pre-bankruptcy contracts.

There are, of course, exceptions to the general rule that an order confirming a plan operates as a discharge. Confirmation of a plan of reorganization will discharge any type of debtor --- corporation, partnership, or individual --- from most types of prepetition debts. It does not, however, discharge an individual debtor from any debt made nondischargeable by section 523 of the Bankruptcy Code. Confirmation does not discharge the debtor if the plan is a liquidation plan, as opposed to one of reorganization, and the debtor is not an individual. When the debtor is an individual, confirmation of a liquidation plan will effect a discharge unless grounds would exist for denying the debtor a discharge if the case were proceeding under chapter 7 instead of chapter 11. 11 U.S.C. 1141(d)(2), 727(a).

Postconfirmation Modification Of The Plan

At any time after confirmation and before "substantial consummation" of a plan, the proponent of a plan may modify a plan if the modified plan would meet certain Bankruptcy Code requirements. 11 U.S.C. 1127(b). This should be distinguished from

preconfirmation modification of the plan. A modified postconfirmation plan does not automatically become the plan. A modified postconfirmation plan in a chapter 11 case becomes the plan only "if circumstances warrant such modification" and the court, after notice and hearing, confirms the plan as modified pursuant to chapter 11 of the Code.

Postconfirmation Administration

Federal Rule of Bankruptcy Procedure 3020(d) provides that, "[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." This authority would include the postconfirmation determination of objections to claims or adversary proceedings which must be resolved before a plan can be fully consummated. Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation. A chapter 11 trustee or debtor in possession has a number of responsibilities to perform after confirmation, including consummating the plan, reporting on the status of consummation, and applying for a final decree.

Revocation Of The Confirmation Order

A revocation of the confirmation order is an undoing or cancellation of the confirmation of a plan. A request for revocation of confirmation, if made at all, must be made by a party in interest within 180 days of confirmation. The court, after notice and hearing, may revoke a confirmation order "if and only if [the confirmation] order was procured by fraud." 11 U.S.C. 1144.

The Final Decree

A final decree closing the case must be entered after the estate has been "fully administered." Fed. R. Bankr. P. 3022. Local bankruptcy court policies may determine when the final decree should be entered and the case closed.

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The "Clashing of the Titans": The Debtor-in-possession vs. the Creditors' Committee

by [Blanche A. Duett](#) on 13 Jul 2001

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At first glance, Title 11 §§1103 and 1107 of the Bankruptcy Code appear to clearly set forth the distinct and separate powers and duties of both the debtor-in-possession (DIP) and the creditors' committee in a chapter 11 bankruptcy proceeding. However, not even Congress—who drafted these provisions—could have contemplated the sometimes volatile clash that occurs between the DIP and the committee due to differing interpretations of the scope of their respective duties and powers.

The DIP's Powers and Duties

In general, under §1107, a DIP has the rights and powers of a trustee and is empowered by the Code to continue operating its business and managing the property of the estate. *Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, [60 B.R. 612, 615 \(Bankr. S.D.N.Y. 1986\)](#). Therefore, a presumption of reasonableness attaches to its management decisions—*i.e.*, where the DIP articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the DIP's conduct. *Id.*; *see, also, In re Simasko Prod. Co.*, [47 B.R. 444 \(D. Colo. 1985\)](#) (the DIP's authority to operate the business

necessarily includes the concomitant discretion to exercise reasonable judgment in ordinary business matters). In *Simasko*, the court held that a DIP's business judgment in seeking approval to enter into a super-priority loan secured by a senior lien in order to drill up to seven oil wells would not be disturbed on the basis of differing testimony regarding the providence of its decision. Specifically, the court stated:

...Simpco's [the DIP's] best business judgment indicate[s] these drilling operations are necessary and reasonable for the benefit of the estate. The discretion to act with regard to business planning activities is at the heart of the debtor's power...In exercising Simpco's business judgment of conducting its drilling operations, it has found it necessary to obtain loans to make these endeavors possible. This is in accordance with the exercise of its sound business discretion...Business judgment should be left to the board room and not to this court...Only in circumstances where there are allegations of, and a real potential for, abuse by corporate insiders should the court scrutinize the actions of the corporation.

Id. [at 449](#).

In this connection, the primary reasons for leaving pre-existing management in control in a chapter 11 reorganization are to preserve the continuity of business expertise and to avoid the substantial cost to the estate of bringing in a neutral third party as trustee. Management is presumed to have the knowledge, experience and expertise to operate the business in the most efficient and economical manner, and thus is given considerable discretion in the operation of its business, generally restricted only by the business judgment rule. *Hansen, Jones & Leta P.C. v. Segal*, [220 B.R. 434, 458-459 \(D. Utah 1998\)](#). However, this does not mean that a DIP is never faced with conflict in making its decisions. *Id.* For example, the *Hansen* court stated:

...The debtor-in-possession has a fiduciary duty of undivided loyalty and exclusive allegiance to the beneficiaries of the "estate"—*i.e.*, equity-holders, secured creditors and unsecured creditors who have conflicting interests. The tension caused by this inherent conflict is intensified by the amount of discretion vested in the debtor-in-possession in guiding the estate through reorganization. The cornerstone of chapter 11 is the presumption that the debtor-in-possession will be permitted to operate its business after filing, unless there is cause for the appointment of a trustee. [11 U.S.C. §§1104, 1108](#). This assures that principals of the debtor-in-possession will ordinarily

exercise considerable control over the business. The primary reasons for leaving pre-existing management in control of a chapter 11 reorganization are to preserve the continuity of business expertise and to avoid the substantial cost to the estate of bringing in a neutral third party as trustee. Management is presumed to have the knowledge, experience and expertise to operate the business in the most efficient and economical manner, and thus is given considerable discretion in the operation of its business, generally restricted only by the business judgment rule. ...The rights and obligations exercised by management under the Bankruptcy Code can be classified into three categories: (1) administrative functions, including hiring professionals and filing the reports and accountings generally associated with running the business while in chapter 11; (2) operating functions, which include discretionary business decisions whether to use, sell or lease property of the estate, obtain financing and continue operation; and (3) loss allocation functions, which include rejecting or assuming executory contracts, objecting to claims, avoiding transfers and obligations, and filing a reorganization plan. *The nature of management's operating and loss allocation functions is such that management is required to differentiate among classes of beneficiaries, and thus make decisions which benefit some claimants over others.* Thus, because its fiduciary duty runs to all classes of claimants, management for the debtor-in-possession is placed in a conflict-ridden position.

[Id. at 458-459](#) (emphasis added). In this connection and as is discussed herein below, it is this conflict that sometimes leads to the antagonism between the DIP and the committee.

The Committee's Powers and Duties

Section 1103(c) authorizes the committee to perform numerous tasks involved with the chapter 11 case—*i.e.*, the committee may consult with the debtor, investigate matters relevant to the case or the formulation of a plan, participate in the plan process, request the appointment of a trustee or examiner, and perform such other services that are in the best interest of the members that they represent. [11 U.S.C. §1103\(c\)](#). Therefore, the function of the committee is to represent and protect the interests of the unsecured creditors in the plan negotiation process and throughout the entire bankruptcy case. *In re ABC Automotive Products Corp.*, [210 B.R. 437, 441 \(Bankr. E.D. Pa. 1997\)](#). Thus, as a fiduciary, the committee has obligations

of fidelity, undivided loyalty and impartial service in the interest of the creditors it represents, and its dealings with those it represents are subject to rigorous scrutiny. *United Steelworkers of America v. Lampl (In re Mesta Machine Co.)*, 67 B.R. 151, 156-157 (Bankr. W.D. Pa. 1986). Therefore, the burden is on the committee not only to prove the good faith of the challenged transaction but also to show its inherent fairness from the viewpoint of those that the committee represents. *Id.* at 157. In fact, the mandatory appointment of the committee was intended to provide dynamic tension with the debtor that would stimulate the reorganization process through effective and efficient oversight and negotiation. *ABC Automotive*, 210 B.R. at 441. Unfortunately, as is discussed herein below, it is this "dynamic tension" that sometimes leads to the dissonance between the DIP and the committee.

The "Clash of the Titans"

Notwithstanding the underlying policies of the powers and duties set forth herein above, when a DIP makes a decision during the chapter 11 proceeding and the committee disagrees, the result is two formidable titans wrestling against each other rather than working together toward a common goal (*i.e.*, a successful reorganization that will benefit both the DIP and the committee). This wrestling match then leads to the ultimate question of which "titan" will survive or, at least, triumph. In this connection, case precedent is clear that unless the committee can clearly show abuse by the DIP, the committee will not be allowed to usurp the powers and duties of the DIP that, from the following cases discussed below, appear to have a very broad scope both under the Code and under case precedent. Thus, although the committee also has some reaching power, that power is not absolute or unbridled. See *In re Calvary Temple Evangelistic Ass'n.*, 47 B.R. 520 (Bankr. D. Minn. 1984); *Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612 (Bankr. S.D.N.Y. 1986); *In re After Six Inc.*, 154 B.R. 876 (Bankr. E.D. Pa. 1993).

For example, in *Calvary Temple*, in which the committee brought a motion for appointment of a trustee and for authority to sell property free and clear of liens, the court dismissed the motion to sell and found that the power of a committee to act in place of the DIP did not extend to having authority to

sell property, and the exercise of the bankruptcy court's equitable powers to allow the committee's motion would not be consistent with the provisions of the bankruptcy laws. *Calvary Temple*, [47 B.R. at 520](#) *et seq.* Specifically, the court stated:

...In a case such as this, where the debtor and the creditors' committee are at odds as to how and when a sale of the debtor's major asset should be accomplished, this necessary component of any negotiation is missing [*i.e.*, the need to be able to negotiate freely]...

...Other than in an unusual case like *Parrot Packing*, where the debtor is fully cooperative, *I do not think the creditors' committee's §1109(b) or 1103(c)(5) powers should be allowed to be extended to motions or proceedings involving the ongoing operations and business judgments of the debtor.* It simply creates too many obstacles.

Id. [at 523](#) (emphasis added). Therefore, the court dismissed the motion to sell but left the motion to appoint a trustee in place. *See, also, Johns-Manville Corp.*, [60 B.R. at 612](#) *et seq.* (where the committee brought turnover action seeking to recover sums the DIP had paid to non-attorney lobbyists representing it in connection with pending legislation, the court denied the committee's motion for summary judgment and granted the DIP's cross motion for summary judgment, finding that its employment of the lobbyists was in the ordinary course of its business and within its discretion).

Likewise, in *After Six*, the court addressed whether to approve the DIP's motion to sell most of the assets of the corporation to the highest bidder in light of the committee's objection thereto and support of the lower bid supplemented with other non-monetary perks. The committee argued that "it was a more appropriate representative of the creditor body than the cadaverous debtor" and that, therefore, its exercise of discretion should be preferred over that of the debtor in a liquidating chapter 11. *Id.* [at 881](#). The court, while it found the "committee's position not only appropriate but socially responsible" in that it could accept a lower bid that consisted of other factors, had difficulties in following the committee's position over that of the bid supported by the DIP in the face of the wishes of the DIP who wished to resolve the §363(b) sale in a contrary manner. *Id.* In this connection, the court stated:

...It is only in the context of a strong and unusual case to the contrary in which a bankruptcy court should approve a sale to a party which the DIP does not deem the highest and/or best bidder in an auction sale...

...This case is clearly a liquidating chapter 11 case, and that factor justifies some greater deference to the committee's viewpoints than were it a reorganization case. This is because the principle underlying rationale for the "business judgment rule," *i.e.*, that a DIP is entitled to some free reign in fulfilling its perceived mission of aiding the economy (and, ironically, the job market) by keeping an ongoing business afloat, is lacking in such circumstances...

...Having neither sought to convert this case to a chapter 7 case nor to appoint a trustee, *the committee has relegated its constituency to a position where, under the Code, its views must be subjected to the deference to the debtor's wishes.*

[Id. at 882-883](#) (emphasis added). Therefore, finding no evidence of a lack of good faith of the DIP and no abuse of its discretion (although it found the DIP's actions "morally" reprehensible), the court allowed the sale to the bidder supported by the DIP, and further stated:

...In sum, we cannot find the debtor's position in favor of accepting the AS [the bidder supported by the DIP] bid as lacking in the requisite "adequacy" in substance on this record. Our heart is heavy in rendering this decision, because we would not have been inclined to exercise our discretion as the debtor did...However, the discretion in what we find is a relatively close case is not, as we perceive it, ours to exercise.

[Id. at 884](#). Thus, based on the foregoing, the scope of the DIP's powers is extensive, and the courts appear to favor the business judgment of the DIP unless the committee can show abuse.

Conclusion

For whatever reason, a chapter 11 proceeding seems to bring with it more emotion and turmoil than a liquidation case. The DIP, with its dilemma of addressing and resolving the tension between those it is representing (*i.e.*, equity-holders, secured creditors and unsecured creditors—all of whom have conflicting interests) versus the committee with its dilemma of representing

and protecting the interests of the unsecured creditors are, in essence, on a road toward inevitable conflict. So, is there a resolution to the "clashing of the titans"? Notwithstanding the scope of the powers and duties granted to the DIP and the committee, respectively, this author believes that the Second Circuit stated the answer succinctly:

...In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity-holders alike.

The *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2nd Cir. 1983). Thus, it is not a matter of the scope of the power belonging to either the DIP or the committee that should prevail. Rather, the answer is to determine a compromise that will benefit the diverse interests of *all* the players in the bankruptcy case.

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